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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 JAY MATTHEU WHEELER,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Acting
11 Commissioner of Social Security,

12 Defendant.

Case No. C16-6010MJP

ORDER

13 Plaintiff Jay Mattheu Wheeler seeks review of the Commissioner's denial of his
14 application for Supplemental Security Income and Disability Insurance Benefits. He contends
15 the administrative law judge ("ALJ") erred in assessing the medical evidence, whether his
16 impairments met or equaled a listing at step three, and the reliability of his subjective testimony
17 and lay witness testimony. Dkt. 11. Mr. Wheeler alleges that these errors led to errors in the
18 residual functional capacity ("RFC") assessment and the ALJ's finding that he could perform
19 jobs existing in significant numbers in the national economy. Dkt. 11 at 18-19. As discussed
20 below, the Court **REVERSES** the Commissioner's decision and **REMANDS** this case for
21 further administrative proceedings.

22 **BACKGROUND**

23 Mr. Wheeler is currently 47 years old, has a 10th-grade education, and previously worked

1 as garbage truck driver, roofer, and lumber yard foreman. Tr. 80, 89, 460. In April 2011, he
2 applied for benefits, alleging disability as of September 15, 2010. Tr. 57, 151-52, 426-38. His
3 applications were denied initially and on reconsideration. Tr. 236-39, 243-56. The ALJ
4 conducted hearings on June 12, 2012, and October 30, 2012 (Tr. 38-104), and subsequently
5 found Mr. Wheeler not disabled. Tr. 214-25. The Appeals Council granted Mr. Wheeler's
6 request for review, and remanded the matter back to the ALJ for further proceedings. Tr. 232-
7 34.

8 The ALJ held another hearing on February 5, 2015 (Tr. 105-50), and subsequently found
9 Mr. Wheeler not disabled. Tr. 14-27. As the Appeals Council denied Mr. Wheeler's request for
10 review, the ALJ's decision is the Commissioner's final decision. Tr. 1-6.

11 **THE ALJ'S DECISION**

12 In a case involving evidence of drug addiction and alcoholism ("DAA"), an ALJ may
13 need to consider the impact of the claimant's DAA on his or her impairments. If the claimant
14 would be considered disabled if the DAA is factored in, the ALJ should go on to consider
15 whether the claimant would still be disabled if the DAA is factored out. *See* Social Security
16 Ruling ("SSR") 13-2p, 2013 WL 621536, at *4-5 (Feb. 20, 2013). If the claimant would not be
17 considered disabled if his or her DAA were factored out, then the DAA is "material" to the
18 disability and the claimant is not entitled to disability benefits. SSR 13-2p, 2013 WL 621536, at
19 *4.

20 In this case, the ALJ applied the five-step disability evaluation process¹ to find Mr.
21 Wheeler disabled initially at step three, and then restarted the evaluation process to consider the
22 materiality of Mr. Wheeler's DAA. The ALJ found:

23 _____
¹ 20 C.F.R. §§ 404.1520, 416.920.

1 **Step one:** Mr. Wheeler did not engage in substantial gainful activity since his alleged
2 onset date.

3 **Step two:** Mr. Wheeler's seizures, cognitive disorder, learning disorder, borderline
4 intellectual functioning, and alcohol abuse are severe impairments.

5 **Step three:** Factoring in Mr. Wheeler's alcohol abuse, his seizure disorder meets the
6 requirements of Listing 11.01.² Therefore, if Mr. Wheeler's DAA is included, he is
7 disabled.

8 **DAA step two:** If Mr. Wheeler stopped the substance use, he would still continue to
9 have a severe impairment or combination of impairments.

10 **DAA step three:** If Mr. Wheeler stopped the substance use, none of his impairments
11 meet the requirements of a listed impairment.

12 **RFC:** If Mr. Wheeler stopped the substance use, he could perform light work, with
13 additional limitations. He can lift/carry 20 pounds occasionally and 10 pounds
14 frequently. He can stand/walk for six hours out of an eight-hour workday, and sit for six
15 hours out of an eight-hour workday. He must avoid concentrated exposure to hazards
16 such as dangerous moving machinery and heights. He can perform simple, repetitive
17 tasks. He can maintain attention and concentration in two-hour increments, with usual
18 and customary breaks. He can interact occasionally with supervisors. He can work
19 superficially and occasionally with the general public. He can maintain appropriate
20 standards of cleanliness and neatness as would be required for work involving only
21 superficial and occasional interaction with the public. He can work superficially with co-
22 workers (not as part of a team). He can respond to workplace changes and set workplace
23 goals, consistent with simple, repetitive work.

Step four: If Mr. Wheeler stopped the substance use, he would not be able to perform
any of his past relevant work.

Step five: If Mr. Wheeler stopped the substance use, he could perform other jobs that
exist in significant numbers in the national economy. Therefore, his DAA is material and
he is not disabled.

Tr. 14-27.

DISCUSSION

Opinion evidence

Mr. Wheeler's opening brief summarizes various medical notes and opinions, with

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 arguments scattered throughout. Dkt. 11 at 3-11.

2 Mr. Wheeler first argues that the ALJ erred in finding at step two that the traumatic brain
3 injury he experienced as a result of an assault was not a medically determinable impairment.
4 Dkt. 11 at 4. The ALJ cited evidence suggesting that the link between Mr. Wheeler's seizures
5 and an assault-related injury was not established. Tr. 17. Mr. Wheeler cites medical notes and
6 imaging results mentioning trauma-related findings in support for his argument that the ALJ
7 substituted her own "lay speculation" as to the impact of his brain injury. Dkt. 11 at 3-4 (citing
8 Tr. 562-63, 568, 575-76, 592, 594).

9 At step two, a claimant must make a threshold showing that her medically determinable
10 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
11 *Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment is
12 medically determinable if it results "from anatomical, physiological, or psychological
13 abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic
14 techniques." 20 C.F.R. §§ 404.1521, 416.921.

15 The Commissioner does not address Mr. Wheeler's challenge to the ALJ's step-two
16 findings. The Court agrees with Mr. Wheeler that it appears the ALJ substituted her own
17 interpretation of the medical evidence, particularly because the State agency opinions on which
18 the ALJ purported to rely included an organic brain syndrome in a list of Mr. Wheeler's
19 medically determinable, severe impairments, and, in fact, identified it as his primary impairment.
20 *See, e.g.*, Tr. 156, 168, 184-85. Also, the medical evidence cited by the ALJ (Tr. 17-18) for the
21 proposition that Mr. Wheeler's seizures are caused by alcohol withdrawal rather than a traumatic
22 brain injury is not persuasive: the ALJ cites an emergency department treatment note written the
23 day after Mr. Wheeler's injury, and this note does not comment on any seizures post-injury or

1 the cause thereof. Tr. 580-81. Furthermore, several examining providers referenced Mr.
2 Wheeler's traumatic brain injury and attributed various limitations to it. *See, e.g.*, Tr. 598-600,
3 625, 651, 659.


4 This step-two error taints the remainder of the ALJ's decision, because the ALJ
5 referenced her interpretation of Mr. Wheeler's traumatic brain injury at step three and in her
6 assessment of Mr. Wheeler's subjective testimony.³ *See* Tr. 18, 22. The ALJ's error in
7 assessing the medical evidence regarding Mr. Wheeler's traumatic brain injury requires
8 reconsideration of the step-two findings on remand, and potentially further development of the
9 record regarding the impact of the injury. Although Mr. Wheeler requested a remand for a
10 finding of disability, this remedy is inappropriate under the circumstances of this case because
11 even if Mr. Wheeler's traumatic brain injury was found to be a medically determinable
12 impairment, Mr. Wheeler is not necessarily disabled as a result. *See Brown-Hunter v. Colvin*,
13 806 F.3d 487, 495 (9th Cir. 2015) ("The touchstone for an award of benefits is the existence of a
14 disability, not the agency's legal error."). Further administrative proceedings would serve a
15 useful purpose, and the Court therefore exercises its discretion to remand this case for further
16 proceedings.

17 CONCLUSION

18 For the foregoing reasons, the Commissioner's decision is **REVERSED** and
19 **REMANDED** for further proceedings.

20 DATED this __15th__ day of _December_, 2017.

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23 ³ Because this error relates to a threshold issue as to the scope of Mr. Wheeler's impairments, the Court need not address Mr. Wheeler's remaining assignments of error.


Marsha L. Pechman
United States District Judge

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